IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent. v. TRACY LEE GONSALVES, Appellant.	No. 33487-9-II UNPUBLISHED OPINION

Hunt, J. — Tracy Gonsalves appeals her convictions for one count of first degree identity theft and five counts of forgery. Gonsalves argues that (1) there was insufficient evidence to prove beyond a reasonable doubt that she was guilty; (2) her convictions violated the double jeopardy clauses of the state and federal constitutions; and (3) her convictions encompassed the same or similar criminal conduct under RCW 9.94A.400(1) for purposes of calculating her offender score. Finding no error, we affirm.

FACTS

I. Crimes

When Carrie Schamehorn moved to Hampton's Alzheimer's Care Unit November 2002, she took along her purse, her checkbook, and her driver's license. Her daughter, Mary Taylor,

began to take care of Schamehorn's financial affairs.

In December 2003, Taylor noticed that several checks for large amounts had recently been written on Schamehorn's Twin County Credit Union account. Taylor knew that Schamehorn had not written the checks. When Taylor examined her mother's purse, she discovered that Schamehorn's checkbook and driver's license were missing. Taylor contacted local authorities and reported the missing items.

The police initiated an investigation, obtained records for checks from Schamehorn's account issued in November 2003, and, along with a copy of a Washington Identification Card issued to Gonsalves, turned them over to the police department's expert handwriting analyst. The handwriting analyst found no indication that Gonsalves had written the entries on the front of the checks. But by comparing the writing on the checks with the signature on Gonsalves' identification card, the handwriting analyst determined that Gonsalves had signed the name "Tracy Gonsalves" on the back of Schamehorn's checks numbered 7764, 7765, 7766, and 7769 to endorse them for cashing. The analyst could not determine whether Gonsalves had also endorsed check number 7767.

At trial, however, Gonsalves admitted endorsing and cashing check number 7767, and she confirmed the analyst's conclusions that she had signed and cashed the other four checks.

The State presented the following additional evidence regarding each of Schamehorn's missing checks:

(1) Check number 7764, written in the amount of $300, payable to and endorsed by Gonsalves, dated November 21, 2003, with the name "Carrie Schamehorn" written on the front as

payer. On November 21, 2003, Gonsalves presented check 7764 to the Bank of America at its South Lacey branch in a QFC grocery store, deposited $50 in her Bank of America account, and took the other $250 in cash.

(2) Check number 7765, written in the amount of $400, payable to and endorsed by Tracy Gonsalves, with the name "Carrie Schamehorn" written on the front as payer. Gonsalves presented check 7765 to the Bank of America's Sleater-Kinney branch in Lacey during the same time period she presented the other checks. Gonsalves deposited $25 into her account, and took $375 cash back.

(3) Check number 7766, written in the amount of $450, payable to and endorsed by Gonsalves, dated November 22, 2003, with the name "Carrie Schamehorn" written on the front as payer. Gonsalves presented the check to the Bank of America at its West Olympia branch in a Top Foods store on November 22, 2003, deposited $25 dollars into her account, and took out the other $425 in cash.

(4) Check number 7767, written in the amount of $425, payable to and endorsed by Gonsalves, dated November 24, 2003, with the name "Carrie Schamehorn" written on the face as payer. Gonsalves presented the check at Bank of America's Sleater-Kinney branch in Lacey. Gonsalves deposited $25 into her account and took the other $400 as cash.

(5) Check number 7769, written in the amount of $440, payable to and endorsed by Gonsalves, dated November 25, 2003. Gonsalves presented the check to the Hawks Prairie branch of Bank of America, deposited $20 into her account, and took $420 as cash.[1]

[1] Gonsalves used the five checks to withdraw a total of $2,015 from Schamehorn's account.

II. Procedure

The State charged Gonsalves with: count one, identity theft in the first degree; counts two through seven, forgery; and counts eight through thirteen, second degree theft. At the end of the jury trial, the court granted the State's motion to dismiss counts two,[2] and eight through thirteen. The jury found Gonsalves guilty of one count of first degree identity theft and five counts of forgery.

At sentencing, the parties agreed that the forgeries had occurred at separate times; thus, each forgery conviction was separate criminal conduct for sentencing purposes. The parties disputed whether the identity theft conviction was the same criminal conduct as the combined forgery convictions. The trial court concluded that each of Gonsalves' convictions constituted separate criminal conduct.

The sentencing court imposed a sentence of 36 months for the first degree identity theft conviction and 13 months for each forgery count, all to run concurrently, for a total of 36 months confinement.

ANALYSIS

I. Sufficiency of Evidence

Gonsalves argues that the evidence was insufficient to prove beyond a reasonable doubt that she was guilty of first degree identity theft and five counts of forgery. We disagree.

[2] Count two was a forgery count pertaining to check number 7760, which had been written and endorsed by another individual.

A. Standard of Review

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358 (1991). A claim of insufficiency admits the truth of the State's evidence. *Salinas*, 119 Wn.2d at 201. All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.*; *State v. Craven* 67 Wn. App. 921, 928, 841 P.2d 774 (1992).

B. Identity Theft

Gonsalves first contends that the State's evidence was insufficient to prove beyond a reasonable doubt that she committed first degree identity theft in violation of RCW 9.35.020.[3] Gonsalves concedes that she endorsed and cashed checks written on Schamehorn's account. But she asserts that she received the checks from a third party and did not know the checks were false. Thus, Gonsalves appears to argue that no rational trier of fact could have found that she obtained, possessed, used, or transferred Schamehorn's financial information with "intent to commit, or to aid or abet, any crime." RCW 9.35.020(1).

At trial, the State produced evidence that Gonsalves cashed five checks on Schamehorn's

[3] Under RCW 9.35.020(1), "[n]o person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." When the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value in excess of $1500 in value, violation of this section constitutes identity theft in the first degree. Identity theft in the first degree is a class B felony. RCW 9.35.020(2).

account within a period of only five days. Each check had been written for a large sum of money with the name "Tracy Gonsalves" listed as payee and Schamehorn as payer. When Gonsalves presented each check to the various banks she visited, she deposited only a token amount and took the rest out in cash. In all, Gonsalves withdrew a total of $2,015 from Schamehorn's account. Furthermore, Gonsalves presented the checks at separate times and separate bank locations. Gonsalves' behavior is consistent with someone attempting to minimize the possibility of drawing bank personnel suspicion. Based on this evidence, a rationale trier of fact could find that Gonsalves knowingly obtained, possessed, used, or transferred Schamehorn's financial information with the intent to commit, or to aid or abet, any crime, namely, theft of Schamehorn's money. RCW 9.35.020.

C. Forgery

Gonsalves' argument that there was insufficient evidence to support her conviction for forgery is essentially the same as for her the identity theft argument: A third party gave her the checks and, consequently, the State's evidence that she endorsed and cashed the checks was insufficient to demonstrate that she knew the checks were forged and had an intent to injure or to defraud.[4] We hold, however, that when viewed in a light most favorable to the State, a rationale trier of fact could find that the evasive manner in which Gonsalves cashed the checks suggested that she both knew the checks were forged and had an intent to injure or defraud both Schamehorn and the banks Gonsalves visited.

[4] RCW 9A.60.020 provides in relevant part: "(1) A person is guilty of forgery if, with intent to injure or defraud: (a) He falsely makes, completes, or alters a written instrument or; (b) He possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged."

D. Circumstantial evidence -- "Pyramiding of Inferences"

Finally, Gonsalves relies on *State v. Bencivenga*, 137 Wn.2d 703, 710-11, 974 P.2d 832 (1999), for the proposition that where the State presents only circumstantial evidence, the essential proof of guilt cannot be supplied solely by a "pyramiding of inferences." Br. Appellant at 5, 7-8. Gonsalves' reliance on *Bencivenga* is misplaced.

In *Bencivenga*, the Court acknowledged that, at one time, it had stated a proposition similar to what Gonsalves is asserting. *Bencivenga*, 137 Wn.2d at 711 (citing *State v. Weaver*, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)). But the Court went on to note that the rule articulated in *Weaver* had since been rejected:

> [O]ur decision in *Weaver* was predicated on our application of the former rule which required that if a conviction rests solely on circumstantial evidence, the circumstances proved must be unequivocal and inconsistent with innocence. *We have since rejected this rule* in favor of the rule that whether the evidence be direct, circumstantial, or a combination of the two, the jury need be instructed that it need only be convinced of the defendant's guilt beyond a reasonable doubt.

Bencivenga, 137 Wn.2d at 711 (citing *Weaver*, 60 Wn.2d at 89; *State v. Gosby*, 85 Wn.2d 758, 767, 539 P.2d 680 (1975)) (emphasis added). The Court further stated that, under current law, "[i]f the inferences and underlying evidence are strong enough to permit a rationale fact finder to find guilt beyond a reasonable doubt, a conviction may be properly based on 'pyramiding inferences.'" *Bencivenga*, 137 Wn.2d at 711 (quoting 1 Clifford S. Fishman, Jones on Evidence: Civil and Criminal § 5.17 at 450 (7th ed. 1992)). The "law makes no distinction between direct and circumstantial evidence." *Id.* (citing 11 Washington Pattern Jury Instructions: Criminal 5.01, at 124 (2d ed. 1994).

We hold that the State presented sufficient evidence to support the jury's verdict that

Gonsalves was guilty of first degree identity theft and five counts of forgery.

II. Double Jeopardy

Gonsalves next contends that her convictions for five counts of forgery and first degree identity theft constituted double jeopardy. More specifically, she argues that the Legislature intended forgery offenses to merge with first degree identity theft. Again we disagree.

The fifth amendment to the United States Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." Similarly, article I, section 9 of the Washington State Constitution guarantees that "[n]o person shall be . . . twice put in jeopardy for the same offense." These provisions prohibit multiple prosecutions or punishments for the same offense. *State v. Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). Beyond these constitutional constraints, the Legislature has the power to define criminal conduct and to assign punishment. *State v. Louis*, 155 Wn.2d 563, 568, 120 P.3d 936 (2005); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

A. Standard of Review

On appeal, our review is limited to ensuring that the lower court did not exceed its legislative authority by imposing multiple punishments for the same offense. *See Calle*, 125 Wn.2d at 776. Accordingly, our review here is limited to determining whether the Legislature intended to allow multiple punishments for first degree identity theft and forgery.

B. Same Evidence Test

In the first step in the double jeopardy test, we look at the language of the pertinent statutes to determine if they expressly authorize multiple punishments for conduct that violates

more than one statute.[5] *Louis*, 155 Wn.2d at 569; *Calle*, 125 Wn.2d at 776-77. Here, the statutes defining first degree identity theft, RCW 9.35.020, and forgery, RCW 9A.60.020, are silent on this issue.[6]

If the statutes are silent on this point, under the second step we turn to principles of statutory construction to determine whether these two statutory offenses may be punished cumulatively. *Baldwin*, 150 Wn.2d at 454; *Calle*, 125 Wn.2d at 778. Washington's "same evidence" test mirrors its federal counterpart, the "same elements" or "*Blockburger*" test, as adopted in *State v. Gocken*, 127 Wn.2d 95, 101-02, 896 P.2d 1267 (1995). *Louis*, 155 Wn.2d at 569 (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Under this test, two statutory offenses are the "same" for double jeopardy purposes if the offenses are "identical both in fact and in law." *Louis*, 155 Wn.2d at 569.

Where the same act or transaction constitutes a violation of two distinct statutory provisions, namely whether there are two offenses or only one, we must determine whether each provision requires proof of a fact which the other does not. *Calle*, 125 Wn.2d at 777-78 (citing

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[5] For example, RCW 9A.52.050 expressly authorizes cumulative punishments for crimes committed during the commission of a burglary. *Calle*, 125 Wn.2d at 776-77 (citing *State v. Davison*, 56 Wn. App. 554, 561-62, 784 P.2d 1268, *review denied*, 114 Wn.2d 1017 (1990)).

[6] In the first step of its double jeopardy analysis, our State Supreme Court recently examined whether the statutes at issue here *expressly or implicitly* authorize separate punishments. *See State v. Freeman*, 153 Wn.2d 765, 773-76, 108 P.3d 753 (2005). This analysis contrasts with the Court's traditional approach that the first step in a double jeopardy analysis is to look to the statutes to determine if they *expressly* authorize multiple punishments for conduct that violates more than one statute. If the statutes are silent on this point, the court next applies the "same evidence" test. *See Louis*, 125 Wn.2d at 569; *Baldwin*, 150 Wn.2d at 454; *Calle*, 125 Wn.2d at 776-77.

Blockburger, 284 U.S. at 304). Under the "law" prong of the analysis, if each crime contains an element that the other does not, courts will presume that the crimes are not the same offense for double jeopardy purposes. *State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005).

Here, Gonsalves essentially acknowledges that first degree identity theft and forgery are not identical in law. As the State Supreme Court noted in *Baldwin*, "forgery requires the making, completion, or alteration of a written instrument"; but "identity theft only requires use of a means of identification with the intent to commit an unlawful act." *Baldwin*, 150 Wn.2d at 455.

Furthermore, as the State observes, first degree identity theft requires the State to prove that a defendant acquired credit, money, or goods in excess of $1,500; forgery does not. In addition, each forgery requires proof that the defendant knowingly offered a forged written instrument with intent to injure or defraud; in contrast, identity theft simply requires proof that the defendant knowingly used financial information with intent to commit a crime. *Compare* RCW 9A.60.020 *with* RCW 9.35.020. Thus, each crime requires proof of a fact or facts that the other does not. First degree identity theft and forgery are not the same "in law" under the *Blockburger* test and, therefore, may be punished separately. *See Baldwin*, 150 Wn.2d at 455.

Moreover, even assuming, without so holding, that first degree identity theft and forgery are the same in law, the offenses Gonsalves committed were not the same in fact. In a similar case, our Supreme Court held that, where a defendant has been convicted of both first degree identity theft and forgery and the victims of each offense are different, the two offenses are not the same "in fact" for double jeopardy purposes. *Baldwin*, 150 Wn.2d at 457 (citing *State v. McJimpson*, 79 Wn. App. 164, 169, 901 P.2d 354 (1995), *review denied*, 129 Wn.2d 1013

(1996)).

Here, only Schamehorn was the victim of Gonsalves' first degree identity theft. But both Schamehorn and the various banks from which Gonsalves drew money were victims of the forgery counts. These two crimes cannot be the same in fact if one crime involves two victims and the other involves only one. Because these offenses are not the same in fact, the two offenses were not the same offense under the same evidence test and their corresponding multiple punishments did not subject Gonsalves to double jeopardy.

C. Merger Doctrine[7]

Similarly, the merger doctrine does not apply to forgery and first degree identity theft.

Gonsalves argues that the Legislature intended forgery offenses to merge with first degree identity theft. More specifically, Gonsalves contends that her commission of the forgeries was "incidental to, part of, or coexistent" with her commission of first degree identity theft and, therefore, the Legislature intended for the offenses to merge.[8] This argument fails.

The merger doctrine is a tool of statutory construction "used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several

[7] The focus of Gonsalves' double jeopardy argument is that the Legislature intended forgery to merge into first degree identity theft.

[8] The *Blockburger* test does not always determine whether two offenses are the "same" for double jeopardy purposes. *Louis*, 155 Wn.2d at 570; *Freeman*, 153 Wn.2d at 772; *Baldwin*, 150 Wn.2d at 455-56. Although the result of the *Blockburger* test is presumed to be the Legislature's intent, it is not controlling where there is clear evidence of contrary legislative intent. *Louis*, 155 Wn.2d at 570; *Freeman*, 153 Wn.2d at 777. Contrary legislative intent may be shown, among other methods, by the statutes' legislative histories or by demonstrating that the legislature intended two criminal offenses to "merge." *See Louis*, 155 Wn.2d at 570; *Freeman*, 153 Wn.2d at 777-78; *State v. Frohs*, 83 Wn. App. 803, 812, 924 P.2d 384 (1996).

statutory provisions." *Louis*, 155 Wn.2d at 570 (quoting *State v. Vladovic*, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983)).

> [T]he merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime (*e.g.*, first degree rape) the State must prove not only that a defendant committed that crime (*e.g.*, rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (*e.g.*, assault or kidnapping).

Vladovic, 99 Wn.2d at 420-21.[9]

Gonsalves' argument that the two offenses merged, because the injuries caused by the forgery offenses are not "separate and distinct" and were "merely incidental" to the first degree identity theft, confuses the exception to the merger doctrine with the doctrine itself. This well recognized exception allows multiple convictions even when separate offenses have merged. *See Freeman*, 153 Wn.2d at 778-79. Offenses that appear to have merged under the doctrine may still be considered separate when the injury or injuries caused by the predicate offense are separate and distinct from, and not merely incidental to, the crime of which the predicate offense forms an element. *Id.; State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979); *State v. Frohs*, 83 Wn. App. 803, 807, 815-16, 924 P.2d 384 (1996).

Here, the merger doctrine does not apply and, therefore, any discussion of the doctrine's exception is inappropriate. Consequently, Gonsalves' convictions for first degree identity theft

[9] For example, the merger doctrine would apply if the legislature had clearly indicated that, in order to prove first degree identity theft, the State must prove a defendant committed identity theft accompanied by forgery. In other words, forgery would have to be an element of first degree identity theft. But first degree identity theft does not require the State to prove forgery. Consequently, the merger doctrine does not apply.

and five counts of forgery withstand scrutiny under double jeopardy principles.

III. Offender Score

Finally, Gonsalves argues that her convictions for first degree identity theft and five forgery counts constituted the "same criminal conduct" for purposes of calculating her offender score. Because the offenses involved different victims, they did not encompass the "same criminal conduct" as defined in RCW 9.94A.589(1)(a).[10] Therefore, the sentencing court did not err in calculating Gonsalves' offender score.

At sentencing, Gonsalves conceded that each forgery occurred at a separate time and did not, therefore, constitute the same criminal conduct. But Gonsalves argued that each forgery constituted the same criminal conduct as the first degree identity theft. Disagreeing, the trial court concluded that the offenses constituted separate criminal conduct because, although Schamehorn and Bank of America were both victims of the forgeries, Schamehorn was the sole victim of the first degree identity theft. The trial court is correct. *See State v. Baldwin*, 111 Wn. App. 631, 640, 45 P.3d 1093 (2002), *aff'd*, 150 Wn.2d 448 (2003), (when crimes involve separate victims, the crimes do not constitute the same criminal conduct under RCW 9.94A.589(1)(a)).[11]

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[10] Multiple current offenses encompassing the "same criminal conduct" count as one crime in determining the defendant's offender score. RCW 9.94A.589(1)(a). "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. *Id.*

[11] Baldwin forged the name of "Kaytie Allshouse" to two deeds of trust in the course of purchasing a single piece of real property. *Baldwin*, 111 Wn. App. at 635-36. One deed secured the interest of an institutional lender, while the other deed was for the benefit of the sellers. Baldwin was subsequently arrested, tried, and found guilty on three counts of identity theft and two counts of forgery. *Id.* at 635-37. On appeal, Baldwin argued, in part, that the identity theft and forgery convictions involved the same criminal conduct and should have been treated as one offense for the purposes of computing her criminal history at sentencing. *Id.* at 640. The court

As in *Baldwin*, both Schamehorn and the various banks Gonsalves visited were victims of her forgeries, but only Schamehorn was a victim of Gonsalves' first degree identity theft. As such, they cannot be the same criminal conduct under RCW 9.94A.589(1)(a). We hold, therefore, that the trial court did not err in calculating Gonsalves' offender score and sentencing.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, P.J.

Bridgewater, J.

disagreed, finding that Kaytie Allshouse was the victim of identity theft, while the beneficiaries of the deeds of trust were the victims of the two counts of forgery. *Id.* at 640-41. Because there were separate victims involved, the court concluded that these crimes did not constitute the same criminal conduct. *Id.*; s*ee also State v. Davis*, 90 Wn. App. 776, 954 P.2d 325 (1998) (two crimes cannot be the same criminal conduct if one involves two victims and the other involves only one).